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No. 111 Original

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

Plaintiff in Intervention,

v.

STATE OF NEW YORK,

Defendant.

MOTION OF THE STATE OF WISCONSIN FOR LEAVE TO INTERVENE AND COMPLAINT IN INTERVENTION

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MOTION OF THE STATE OF WISCONSIN
FOR LEAVE TO INTERVENE

Pursuant to Rule 9 of the Rules of the Supreme Court, the State of Wisconsin ("Wisconsin"), a sovereign state of the United States of America, by and through Attorney General Donald J. Hanaway and Assistant Attorney General Daniel D. Stier, moves the Court for an order

permitting it to intervene as plaintiff in the above-entitled cause, and permitting its proposed Complaint in Intervention attached hereto, to be filed in this action. The Complaint is essentially identical to the Complaint in Intervention earlier filed in this action by the State of Texas. In support of this motion, Wisconsin would show the Court as follows:

I.

1. On or about May 31, 1988, the Court granted the Motion of Plaintiff State of Delaware ("Delaware") for leave to file a complaint invoking the original jurisdiction of the Court to resolve a controversy between Delaware and Defendant State of New York ("New York") as to which state is entitled to claim and take possession of certain unclaimed

intangible personal property, consisting of moneys and other intangible personal property ("Excess Receipts"),[1] held or formerly held by securities brokerage houses incorporated in Delaware and demanded by or remitted to New York.

2. On December 12, 1988, Thomas H. Jackson, Esquire, was appointed Special Master in this case.

3. On or about February 21, 1989, the Court granted the Motion of Plaintiff in Intervention State of Texas ("Texas") to intervene and file its Complaint in Intervention in this case.

4. As set forth in detail in its Complaint, Texas claims a portion of the Excess Receipts which constitute the subject matter of the original

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[1]In its Complaint in Intervention, Texas has defined certain terms. Wisconsin incorporates those definitions herein by reference.

controversy between Delaware and New York, specifically, that portion of Excess Receipts held or formerly held by securities brokerage houses incorporated in Delaware which are attributable to Issuers incorporated in Texas.

5. Texas also claims the right to take custodial possession of certain additional excess receipts, consisting of excess receipts attributable to Issuers incorporated in Texas held or formerly held by the Depository Trust Company and excess receipts which have arisen in connection with Distributions made by Texas municipal and other governmental Issuers ("Additional Excess Receipts") which are now being demanded by or remitted to New York. It is Wisconsin's understanding that the Court intends to consider claims to both the Excess Receipts originally at issue and the

Additional Excess Receipts identified by Texas.

6. Texas claims a portion of the Excess Receipts and the Additional Excess Receipts for the reason that they constitute a debt owed by the Issuer to the securities' Beneficial Owner. If the identity of the Beneficial Owner is unknown, the Excess Receipts and Additional Excess Receipts should be remitted to the state of incorporation of the Issuer under the state's unclaimed property law.

7. Wisconsin claims a portion of the Excess Receipts and Additional Excess Receipts at issue in this action, specifically, that portion of the Excess Receipts and Additional Excess Receipts attributable to Issuers incorporated in Wisconsin and that portion attributable

to Wisconsin municipalities and other governmental entities.

8. The amount of Excess Receipts and Additional Excess Receipts that Wisconsin is entitled to claim is presently unknown. Wisconsin has never, prior to this lawsuit, had any reason to identify and quantify such Excess Receipts and Additional Excess Receipts. However, it is probable that at lease one Issuer incorporated in Wisconsin has generated Excess Receipts and Additional Excess Receipts. Moreover, it is a virtual certainty that bonds issued by Wisconsin municipalities and other governmental entities have generated Additional Excess Receipts subject to the claim of Wisconsin.

9. Wisconsin asserts its claim pursuant to ch. 177, Wis. Stats., which provides, in essence, for the custodial

taking of abandoned or unclaimed intangible personal property when the existence and location of the owner of the property is unknown to the holder of the property, and no claim to the property has been asserted within the applicable dormancy period, which for most types of personal property is five years.

10. Wisconsin supports and adopts as if fully set forth by Wisconsin in its own pleadings Texas' Brief in Support of Motion for Leave to File, and the factual and legal arguments set forth therein, to the extent same are applicable and relevant to the claims of Wisconsin set forth in Paragraph 7 above.

11. It is essential that Wisconsin be permitted to intervene in its own right in this proceeding. The decision of the Court will establish a rule of law

which will conclusively determine the future right of Wisconsin to claim and take possession of unclaimed property similar or identical in nature to the Excess Receipts and Additional Excess Receipts at issue herein. Additionally, if Wisconsin is to establish its claim and right to take custodial possession of a portion of the property presently at issue, it must have access to the discovery process in order to identify those Excess Receipts and Additional Excess Receipts attributable to Issuers incorporated in Wisconsin. As a party, Wisconsin can obtain a ruling from the Court recognizing its right to take possession of specific unclaimed property pursuant to its individual unclaimed property laws and ordering New York to tender such property to Wisconsin.

12. Based on the foregoing, Wisconsin is entitled to intervene as a matter of right pursuant to Rule 24(a)(2), Federal Rules of Civil Procedure. Alternatively, Wisconsin urges the Court to exercise its discretion and grant the requested intervention pursuant to Rule 24(b), Federal Rules of Civil Procedure.

13. The intervention of Wisconsin in this action will not unduly delay these proceedings or prejudice the adjudication of the rights of the present parties. To the extent that it can do so, Texas has offered to serve as lead counsel for those states, including Wisconsin, wishing to intervene and represent themselves in this case. The addition of Wisconsin as a Plaintiff in Intervention will not result, therefore,

in an unmanageable increase in the number of parties to this litigation.

14. The Court, in Western Union Tel. Co. v. Commonwealth of Pa., 368 U.S. 71 (1961), recognized the difficulties inherent in resolving controversies between different states over their respective rights to claim and take possession of unclaimed intangible personal property, and concluded that the United States Supreme Court was the appropriate forum in which "all the States that want to do so can present their claims for consideration and final authoritative determination." Id. at 79. See also Pennsylvania v. New York, 407 U.S. 206 (1972). It is such an opportunity to present its claim that Wisconsin seeks by urging this Court to grant leave to intervene herein.

Wherefore, Wisconsin prays that it be permitted to intervene as a party plaintiff in this case to assert the claims set forth in the attached Complaint in Intervention.

Respectfully submitted,

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May, 1989

No. 111 Original

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

Plaintiff in Intervention,

v.

STATE OF NEW YORK,

Defendant.

COMPLAINT IN INTERVENTION

The State of Wisconsin, Plaintiff in Intervention, by Donald J. Hanaway, its Attorney General, with leave of the Court first had, files this Complaint in Intervention in the above styled and numbered cause. This Complaint in

Intervention is essentially identical to the Complaint in Intervention previously filed by the State of Texas. The State of Wisconsin complains and alleges as follows:

I. JURISDICTION.

1. The original jurisdiction of this Court is invoked under article III, section 2 of the United States Constitution and 28 U.S.C. § 1251 (1966).

II. PENDING ACTION.

2. On May 31, 1988, this Court granted the motion of Plaintiff State of Delaware ("Delaware") for leave to file a complaint invoking the original jurisdiction of the Court to resolve a controversy between Delaware and Defendant State of New York ("New York") as to which state is entitled to claim and take possession of certain unclaimed moneys and

other intangible property held by securities brokerage firms incorporated in Delaware.

3. On December 12, 1988, Thomas H. Jackson, Esquire, was appointed Special Master to hear this case.

4. On February 21, 1989, the Court granted the motion of the State of Texas ("Texas") for leave to file a complaint in intervention.

III. INTEREST AND CLAIM OF PLAINTIFF IN INTERVENTION.

4. Plaintiff in Intervention, the State of Wisconsin, acts by and through the Attorney General of Wisconsin, the official of the State of Wisconsin charged with the duty under the Constitution and the laws of the State of prosecuting unclaimed property suits at the request of the Governor and the Treasurer of the State of Wisconsin and

of representing the State of Wisconsin in litigation generally.

5. At present, this litigation involves a dispute as to which state is entitled to the custodial taking of certain unclaimed, intangible personal property ("Excess Receipts"), which comes into being and acquires its character as unclaimed property in the context of securities transactions. The Excess Receipts consist of unclaimed payments of dividends, profits, principal, interest and securities representing any of the foregoing ("Distributions"), held or formerly held by brokerage firms incorporated in Delaware. The Excess Receipts are Distributions received by these brokerage firms for the benefit of their customers which exceed the amounts to which the brokerage firms are entitled. The Excess Receipts are usually maintained in a "Suspense Account" until

expiration of the applicable dormancy period, after which time, under current practice, they are remitted to New York.

6. Plaintiff in Intervention claims a portion of the Excess Receipts. Additionally, Plaintiff in Intervention seeks to have this Court consider and determine rights to certain additional Excess Receipts ("Additional Excess Receipts") which are not yet part of this litigation which involves the same issues. These Additional Excess Receipts consist of: (a) excess receipts presently being remitted to New York which are held by the Depository Trust Company ("DTC"), a national clearinghouse for the settlement of trades in corporate and municipal securities; and (b) excess receipts arising from unclaimed principal and interest payments on municipal and state bonds which have never been remitted to any state.

Additional Excess Receipts are of the same character and come into existence in the exact same manner as the Excess Receipts at issue in the principal case and will necessarily be controlled by the Court's ruling in this case.

7. Wisconsin is entitled to a portion of the Excess Receipts at issue in this litigation (and to a portion of the Additional Excess Receipts it seeks to have the Court consider) because they constitute a debt of the entity ("Issuer") initially issuing the shares of stock, bonds, debentures or other securities instruments owed to the entity or individual ("Beneficial Owner") who has the economic rights to the security, including the entitlement to Distributions.

8. If the identity and location of the Beneficial Owner is unknown, the state of incorporation of the Issuer should be

entitled to collect the Excess Receipts under that state's unclaimed property law. Under existing law and practice, a debt of identical character is remitted to the Issuer's state of incorporation when held by the Issuer's Paying Agent (defined in part IV) so it should be similarly remitted to the state of incorporation of the Issuer when held by other agents in the securities holding, transfer and distribution system ("Distribution System"). Distributions generated by Issuers incorporated in the State of Wisconsin and those generated by Wisconsin municipalities which are unclaimed and whose Beneficial Owner is unknown, should be returned to the State of Wisconsin. The claim of Plaintiff in Intervention is based upon the practical reality of the manner in which securities are traded and Distributions are paid, and relies upon a strict interpretation of this

Court's holding in State of Texas v. State of New Jersey, 379 U.S. 674 (1965).

9. By this action, Plaintiff in Intervention seeks a judgment that New York pay to Plaintiff in Intervention all Excess Receipts and Additional Excess Receipts attributable to Issuers incorporated in the State of Wisconsin and those that are attributable to Wisconsin municipalities. Plaintiff in Intervention further seeks a declaration that Wisconsin has the right in the future to claim and take possession of Excess Receipts and Additional Excess Receipts without interference from any other state. Plaintiff in Intervention additionally seeks an order from this Court enjoining and restraining New York from demanding or collecting such Excess Receipts and Additional Excess Receipts, and from expending any such sums collected, but presently unspent, which are

attributable to Issuers incorporated in the State of Wisconsin and to Wisconsin municipalities, until such time as this controversy is resolved.

10. Plaintiff in Intervention asserts its claim pursuant to ch. 177, Wis. Stats.; which provides, in essence, for the custodial taking of abandoned or unclaimed intangible personal property when the existence and location of the owner of the property is unknown to the holder of the property, and no claim to said property has been asserted within the applicable dormancy period, which for most types of personal property is five years.

IV. DEFINITIONS.

11. The process by which securities Distributions are made and which gives rise to the Excess Receipts is complex. Because the process has evolved within the last

twenty years, it has not been extensively studied and is generally understood only by persons who work within the Distribution System. In order to assist the Court, Plaintiff in Intervention refers the Court to the charts attached to the Texas Complaint as Exhibits "1" and "2." For the Court's further convenience, Plaintiff in Intervention will use the following definitions previously assembled by Texas throughout the remainder of this Complaint.

"Additional Excess Receipts" means Distributions received by DTC for the benefit of DTC Participants which exceeds the amount paid to DTC Participants. These funds are maintained in the "Unclaimed Dividends Account" at DTC until after the expiration of the applicable dormancy period, after which time, under current practice, they are remitted to New York. "Additional Excess Receipts" also means

unclaimed principal and interest payments of bonds, debentures or other debt obligations attributable to corporate and Governmental Issuers. "Beneficial Owner" or "Customer" means an entity or individual who acquires and owns the economic rights with respect to a security, including entitlement to Distributions, and the power to sell or dispose of the security.

"Book Entry Accounting" means the computerized accounting process by which ownership interests in securities are recorded and Distributions are proportionally allocated and recorded.

"Book Entry Certificate System" means the process of reflecting the ownership of securities only through computerized notations in the books and records. In this Book Entry Certificate System the Issuer initially issues a single Physical Certificate (or one Physical Certificate for

each maturity and interest rate) in the name of DTC or Cede & Co., its Nominee. Cede & Co. is the only Record Owner, as reflected on the Issuer's books and records. Thereafter, all ownership of securities is evidenced by a computer printout confirmation statement of a securities transaction ("Book Entry Certificate"), rather than by possession of a Physical Certificate.

"Cede & Co." is the principal Nominee used by the Depository Trust Company.

"Depository Trust Company" ("DTC") is a trust company incorporated under the banking laws of New York, and is the national clearing house created by the brokerage firms and banks in cooperation

with the New York Stock Exchange.[1] As a clearinghouse, it provides a system for the settlement of trades in corporate and municipal securities between brokerage firms without the delivery of Physical Certificates. It also provides a system for the collection and disbursement of Distributions for the ultimate benefit of Beneficial Owners or Customers by making federal wire transfers to banks for the accounts of DTC Participants. DTC is the principal Intermediary in the modern Distribution System. Access to the Depository Trust Company is limited solely to DTC Participants.

"Distributions" means payments of dividends, profits, principal, interest and

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[1]Plaintiff in Intervention believes that the Depository Trust Company is one of two clearinghouses operating in the United States. Any reference to the Depository Trust Company or DTC shall mean and include all clearinghouses.

securities representing any of the foregoing.

"Distribution System" means the chain of transactions between the Issuer and the Beneficial Owner, which includes all Intermediaries in the trading of securities and the receipt and disbursement of Distributions.

"DTC Participant" means the brokerage firms and banks who are members of the Depository Trust Company.[2] All of the brokerage firms identified by Delaware in its Complaint are DTC Participants.

"Excess Receipts" means Distributions received by brokerage firms incorporated in Delaware for the benefit of their Customers which exceeds the amounts which the

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[2]DTC Participants as of December 31, 1987, are listed in the DTC Annual Report. Wisconsin is informed that a copy of the report has previously been filed with the Clerk.

brokerage firms are entitled. These funds are usually maintained in a "Suspense Account" until expiration of the applicable dormancy period, after which time, under current practice, they are remitted to New York.

"Ex Dividend Date" or "Ex Date" is the date determined pursuant to rules of the securities exchanges and the National Association of Securities Dealers to establish whether a buyer or seller of securities is entitled to a Distribution that has been previously announced but not as yet paid. Under these rules, Ex Dividend Date is five business days before the Record Date. Buyers of securities in transactions that occur before the Ex Dividend Date are entitled to the Distribution; buyers of securities in transactions that occur on or after the Ex Dividend Date are not entitled

to the distributions even though they might own the securities on the Record Date.

"Governmental Issuer" is a state or any political subdivision thereof authorized under state law to issue municipal bonds, notes or other obligations.

"Intermediary" means any entity that acts as a conduit in connection with the receipt and disbursement of any part of a Distribution in the process by which that Distribution moves from the Issuer to a Beneficial Owner or Customer. The principal Intermediaries are Paying Agents, the Depository Trust Company, DTC Participants and other brokerage firms.

"Issuer" means the entity initially issuing the shares of stock, bonds, debentures or other securities instruments.

"Nominee" means an entity, usually a general partnership, that is named for purposes of convenience as the Record Owner

of securities owned by or for the account of Intermediaries or Beneficial Owners.

"Paying Agent" means an entity, usually a bank, that is responsible for receiving Distributions from the Issuer and disbursing the Distributions on behalf of the Issuer. A Paying Agent may also maintain the stock or bond registration books as Registrar. The Paying Agent is the first Intermediary in the Physical Certificate System. It makes payments to Record Owners as reflected on the Issuer's books and records. In modern practice the majority of outstanding securities are held of record, as shown on the Issuer's books and records, in the name of Cede & Co. Most of the remaining Record Owners are large institutional investors such as insurance companies, mutual funds and brokerage firms trading in the names of their Nominees.

"Physical Certificate" means an instrument prepared by the Issuer of a security that reflects the named ownership of the security as shown on the records of the Issuer, along with the amount, type, interest rate, maturity date, if any, and all other such relevant terms.

"Physical Certificate System" means the process of issuing Physical Certificates by the Issuer in the name of each individual or entity whose name appears on the Issuer's books and records as the Record Owner. In modern practice, as brokerage firms come into possession of Physical Certificates, these Physical Certificates are reregistered in either the name of Cede & Co. or a Nominee name.

"Record Date" for a Distribution is the date established by the Issuer to determine the identity of the Record Owner to whom the Distribution is to be made.

"Record Owner" means the person in whose name the ownership of a security is recorded on the books of the Issuer. In modern securities practice the Record Owner is almost always either an Intermediary (usually Cede & Co.), a Nominee used by an institutional investor.

V. BACKGROUND.

12. Radical changes have occurred in the last twenty years with respect to the manner in which securities are traded and held, and Distributions are paid. A brief description of the evolution of the Distribution System is necessary to provide the background of this litigation and to facilitate a full understanding of the complex issues it involves.

13. Prior to 1970, securities transactions in shares of stock were effected through the actual transfer of

Physical Certificates. In securities exchanges and over-the-counter transactions, the brokerage firm representing the Customer who was selling securities delivered Physical Certificates to the brokerage firm representing the Customer who was buying securities. The purchasing Customer would then normally receive a Physical Certificate in his name. That Customer then became the Record Owner of the securities, and Distributions were thereafter made by the Issuer's Paying Agent by check mailed directly to the Customer. If the Customer was involved in active securities speculation, he might request that the Physical Certificates remain in the street name of his brokerage firm. He would then rely on his brokerage firm to produce the physical Certificate when necessary to complete a subsequent resale of the securities.

14. The use of Physical Certificates carried with it a considerable degree of risk. All Physical Certificates are negotiable instruments, and are vulnerable to theft and forgery. Physical Certificates are also subject to being lost or misplaced, or destroyed in connection with some type of casualty loss. Those Customers who chose not to hold their own Physical Certificates ran the additional risk that the brokerage firm might be unable to account for the Physical Certificates, or, worse yet, the brokerage firm might become insolvent and the Customers would become unsecured creditors.

15. The handling of Physical Certificates during this period was a major and troublesome aspect of the securities business. Issuers employed Paying Agents or stock transfer agents whose primary functions were to reregister Physical

Certificates, cancel old Physical Certificates, and issue new Physical Certificates. The volume of transactions processed through the brokerage firms and these transfer agents was tremendous.

16. Prior to 1983 securities transactions in bonds, debentures and other long term instruments of indebtedness were also handled through Physical Certificates. However, these Physical Certificates involved an even greater risk because they were often made payable to bearer. Anyone who possessed the debt instrument was, upon presentation, entitled to payment. Interest was traditionally payable only through a process of physically clipping coupons off the bearer bonds and delivering them to the Issuer's Paying Agent. Before the 1983 changes in the federal tax law, some Issuers did issue registered bonds or debentures to named owners, which

instruments could then be transferred by endorsement, much like stock, but the greatest majority were issued in bearer form. Today all municipal bonds are issued in registered form, and interest is paid by check mailed to the Record Owner by the Issuer's Paying Agent.

17. During the late 1960s and early 1970s, the traditional manner of handling securities transactions described above began to break down under the sheer weight of the increased volume of transactions. The "back offices" of brokerage firms became inundated with paper, and the tracing of transactions became increasingly difficult. The entire securities industry was confronted with a paperwork and record-keeping crisis inevitable in a system in which trillions of Physical Certificates were physically moved each year.

18. The present Distribution System for handling securities transactions evolved because of two major changes in the method by which these transactions were processed. Enactment by Congress of the Securities Investor Protection Act of 1970, 15 U.S.C. §§ 78aaa.-78lll. (1981), permitted Customers to accept bookkeeping entries without regard to the location of their Physical Certificates without risking the loss of capital in the event of brokerage firm failure. Secondly, the Depository Trust Company was created to serve as a nationwide clearinghouse. Brokerage firms who became DTC Participants could now deal with each other through Book Entry Accounting on the records of DTC, without the delivery of any Physical Certificates, by simply endorsing and reregistering all Physical Certificates in the name of Cede & Co. thereby making Cede

& Co. the only Record Owner, and depositing all these Physical Certificates at DTC. The Distribution System has now evolved even further. An Issuer may choose to issue securities in the Book Entry Certificate System so that a single Physical Certificate is issued in the name of Cede & Co. on behalf of DTC. Thereafter, all trades occur in book entry form. In the Book Entry Certificate System, no entity other than DTC has the authority to receive Physical Certificates.

19. The shift to Book Entry Accounting for recording the beneficial ownership of securities is now virtually complete. Less than one percent (1%) of all securities transactions involve the actual delivery of Physical Certificates. Most Physical Certificates outstanding today are held in street name, with Cede & Co. being the predominant holder. In well

over fifty percent (50%) of new issues, no Physical Certificates are available to Customers at all because the Issuer used the Book Entry Certificate System.

VI. CLAIMS OF DELAWARE AND NEW YORK.

20. Delaware and New York each argue that their respective claims to the Excess Receipts are supported by the rulings of this Court in Texas v. New Jersey, 379 U.S. 674, and Pennsylvania v. New York, 407 U.S. 206 (1972). These cases establish the principle that unclaimed property is subject to being remitted to the state of the last known address of its owner. If that address is unknown, the property is to be remitted to the state of incorporation of the debtor.

21. Delaware asserts the right to claim the Excess Receipts at issue herein on the basis that the identity of said

property's Beneficial Owner, whom Delaware equates with a creditor, is unknown. Therefore, the Excess Receipts should be remitted to Delaware as the state of incorporation of the brokerage firm holding such funds, which is characterized by Delaware as the debtor.

22. New York, on the other hand, argues that the property's Beneficial Owner is always paid the Distributions to which he is entitled. The Beneficial Owner therefore has no claim to the Excess Receipts and his identity is irrelevant to the analysis of rights at issue herein. Instead, contends New York, the last known address of the brokerage firms that were underpaid, characterized by New York as the "creditor" firms, determines to which state the overpayments held by the "debtor" firms should be paid. Since most such brokerage firms have New York trading addresses,

New York is entitled to claim the Excess Receipts.

23. The arguments of both Delaware and New York are based upon narrow technical and legalistic analyses of a complex Distribution System, which is more fully described in Part VIII below. Both Delaware's designation of the brokerage firms as "debtors," and New York's classification of the "underpaid" brokerage firms as "creditors," fail to properly characterize the relationships of the various parties to ownership and Distribution transactions of the present Distribution System. In this Distribution System, at least two Intermediaries are always involved in the routine processing of ownership trades and moving Distributions between the Issuer and the ultimate Beneficial Owner/Customer. Delaware is basically contending that the

state of incorporation of the last Intermediary, the brokerage firm holding the Excess Receipts, determines the state to which all the unclaimed property is to be remitted. New York contends that all Excess Receipts should be remitted to New York for the reason that the principal business offices and headquarters of most of the Intermediary brokerage firms are located in the New York City area. Under either argument, the place of incorporation of mere Intermediaries, who act simply as transfer agents and who themselves as a rule make no claim to the Distributions,[3] will determine which state can claim and

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[3]Delaware notes that one brokerage firm, Paine, Webber, Inc. may claim entitlement to Excess Receipts. Under the theory set forth, any brokerage firm desirous of asserting such claim who has traced the transaction sufficiently to identify entitlement to the funds could submit its claim to the Issuer's state of incorporation for payment.

take possession of hundreds of millions of dollars. As a practical matter under either states' theory, only two states would be legally authorized to claim the great bulk of these moneys.

VII. CLAIM OF WISCONSIN.

24. In both Texas v. New Jersey, 379 U.S. 674, and Pennsylvania v. New York, 407 U.S. 206, the Court made clear its commitment to resolving unclaimed property controversies in a manner that is both equitable and easy to administer. In Texas v. New Jersey, 379 U.S. at 681, Mr. Justice Black adopted a rule that "involves a factual issue simple and easy to resolve, and leaves no legal issue to be decided" and that "will tend to distribute escheats among the States in the proportion of the commercial activities of their residents." The rule was clear under these legal

principles that when a Paying Agent could not find a last known address for the Record Owner, unclaimed dividends should be remitted to the state of incorporation of the Issuer. The same principle should be adopted in this litigation since the addition of mere Intermediaries to the chain of distribution should not affect the entitlement of states to the Excess Receipts. This would also return these moneys to the states pro rata according to each state's commercial activity, and would mitigate the harshness of the "winner take all" positions espoused by both Delaware and New York. This is the resolution urged by Plaintiff in Intervention.

VIII. DESCRIPTION OF THE DISTRIBUTION SYSTEM: PHYSICAL CERTIFICATES.

25. Whenever securities are to be issued, the Issuer must first choose whether to use the Physical Certificates

System or the Book Entry Certificate System. This part of the Complaint assumes that the Issuer selects the Physical Certificate System and opts to issue Physical Certificates in registered form, e.g., stock, if it is an equity transaction, or bonds/debentures if it is a debt transaction.

26. The Physical Certificates are purchased at closing by initial underwriters, who are DTC Participants. The DTC Participants then immediately reregister the Physical Certificates in the name of the Nominee of DTC, Cede & Co. The Physical Certificates are deposited at DTC, where they are effectively "parked" until after maturity or abandonment. All trades of Physical Certificates between or among DTC Participants occur only on the books and records of DTC.

27. By means of the foregoing, Cede & Co. becomes the Record Owner of all Physical Certificates deposited with DTC, although neither DTC nor Cede & Co. claims or has any legal ownership rights to, or interest in, the Physical Certificates except as custodian. Indeed, DTC characterizes itself as merely a collections and clearing agent.

28. Purchases of securities in the form of Physical Certificates held at DTC are made through brokerage firms who are, or act through, DTC Participants. These purchases are made in book entry form only. Customers do not receive from the Issuer or from their DTC Participant Physical Certificates evidencing their ownership interest in the securities. Rather, each Customer maintains an account at a DTC Participant or other brokerage firm. The books and records of the DTC Participant or

other brokerage firm constitutes the only evidence of each Customer's legal ownership of an undivided interest in the Physical Certificates held at DTC. When such "beneficial ownership" is purchased, the DTC Participant or other brokerage firm sends its Customer a transaction statement confirming and setting forth the terms of the purchase. In fact, DTC was created to eliminate the need to send Physical Certificates back to the Issuer's Paying Agent for reregistration in the name of the new owner or his brokerage firm each time a sale or transfer of such Physical Certificates occurred between the brokerage firms. Transactions at DTC are accomplished by the creation of what are, in effect, fungible Physical Certificates, whose only indices of ownership are evidenced on the books and records of DTC and DTC Participants.

29. The Customer who wants a Physical Certificate must make a request through a DTC Participant to have the Physical Certificate reregistered in her name. The DTC Participant then instructs DTC to endorse the appropriate amount of Physical Certificates purchased by its Customer and deliver those Physical Certificates to the Issuer's Paying Agent for reregistration. The reregistration process takes six to eight weeks.

30. Three (3) sets of books and records reflect the interests of the respective parties in Physical Certificates. The books and records of the Issuer (or its Paying Agent) reflect that Physical Certificates are held by Cede & Co. The books and records of DTC evidence the amount and identity of Physical Certificates held by each DTC Participant. The books and records of each DTC

Participant evidence the beneficial ownership of its respective Customers. Thus, there are at least three (3) sets of Record Owners evidenced on three (3) separate sets of books and records in the Distribution System.

31. Since Physical Certificates are registered in the name of Cede & Co., Distributions are paid by or at the direction of the Issuer directly to Cede & Co. Each Distribution received by DTC is allocated among DTC Participants in accordance with the ownership records of DTC on Ex Date. Payment of the Distribution to DTC Participants is the responsibility of DTC. Payment of the Distribution to the Customers or Beneficial Owners is the responsibility of DTC Participants. Immediately after DTC wires payment to the accounts of DTC Participants at their New York headquarters, DTC

Participants wire funds to each of their brokerage firms' branch offices in every state around the country. The local Customers are then paid the amount of the Distribution to which they are entitled according to their beneficial ownership interests.

32. As there are at least three (3) sets of books and records evidencing record ownership, there are also at least three (3) sets of books and records for every Distribution -- those maintained by the Issuer, by DTC and by each DTC Participant and their branch offices.

33. After it receives payment from DTC and credits its Customer accounts, each brokerage firm compares the Distribution it has paid out to its Customers, the Beneficial Owners, with the Distribution it has received from DTC. If all records are accurate, and nothing has changed since the

Ex Date, the amounts of the Distributions match. If, however, there have been transfers of beneficial ownership which have not been promptly recorded or which have occurred on or around the Ex Date, or if mistakes have been made in the recording or clearing of transactions by DTC or DTC Participants, some brokerage firms may receive an excess payment. It is this type of excess payment, referred to as Excess Receipts by Plaintiff in Intervention, that is presently in issue in this lawsuit.

34. The following example illustrates the foregoing:

On January 1, Customer X (Beneficial Owner) purchases 100 shares of the stock of Wisconsin, Inc., through Broker A, a DTC Participant. Broker A purchases the stock from Broker B, also a DTC Participant, Broker A credits the account of Customer X, also on January 1.

Wisconsin, Inc. declared a dividend of $5 per share with Ex Date of January 2. Broker A credits the account of Customer X $500 for the dividend payment. However, the transfer of interest in the stock from Broker B to Broker A has not been recorded, so Broker B is credited by DTC with $500 in dividends.

Broker A has been underpaid, but Broker A goes ahead and pays its Customer. Broker B has been overpaid, or has received Excess Receipts.

35. Most DTC Participants who are underpaid decline to trace individual securities transactions through the Distribution System to identify the DTC Participant that received the Excess Receipts, and fail to utilize the DTC claims procedure to recover the amount of said Excess Receipts. It is best expressed as "it all comes out in the wash" attitude

because of the huge volume and the frequency of occurrence. If accounts are to be settled among DTC Participants, such must be done, pursuant to DTC rule, through Cede & Co. and within a short period of time. Moreover, in some cases tracing may not be possible at all because of inadequate or incomplete records. The huge volume of transactions has created such a gnarled system, involving billions of entries on a paper trail, that tracing is generally neither cost-effective nor feasible. In 1987 DTC Participants delivered 9.8 trillion dollars of securities through Book Entry Accounting.

DESCRIPTION OF DISTRIBUTION SYSTEM:
BOOK ENTRY CERTIFICATE SYSTEM

36. This part of the Complaint assumes that the Issuer has chosen to issue securities in Book Entry Certificate form. Book Entry Certificates were created to

relieve the tremendous paper burden created by Physical Certificates. Under this method of issuing stocks and bonds, the Issuer issues one Physical Certificate (or one Physical Certificate for each maturity and each interest rate), in the name of Cede & Co. as the Record Owner. At closing, the underwriting DTC Participants instruct Cede & Co. to credit their respective accounts with their appropriate portion of Book Entry Certificates in exchange for cash paid directly to the Issuer. Thereafter, all subsequent trades are conducted solely by computerized credits and debits to DTC Participant accounts, and computerized credits and debits by DTC Participants of the accounts of their Customers, the Beneficial Owners. The Customers are told from the beginning that they are not entitled to receive, nor will they ever receive, Physical

Certificates, and that all notices of redemption, tender offers, mergers, stock dividends and-cash dividends will be sent only to Cede & Co. DTC Participants are advised by Cede & Co. of such events, and DTC Participants are responsible for providing their Customers as Beneficial Owners with this notice.

37. With respect to Distributions in the Book Entry Certificate System, the Issuer makes all payments directly to Cede & Co. by wire transfer of funds to Cede & Co.'s account at the New York Federal Reserve Bank. Thereafter, the respective interests of DTC Participants are paid as reflected on the books and records of DTC. The beneficial ownership interest of each of the Participants' Customers are paid according to the books and records of the DTC Participants and their branch offices. Thus, as is the case with Physical

Certificates, at least three (3) distinct sets of books and records are maintained in connection with Book Entry Certificates, those of the Issuer, of DTC, and of the DTC Participants and their branch offices. Each reflects a different Record Owner.

38. The foregoing describes how most of the Excess Receipts or unclaimed property that is the subject of this lawsuit came into existence. Generally, such Excess Receipts consist of money. However, such property can and does also include Physical Certificates registered to Cede & Co. that are held at DTC.

IX. PLAINTIFF IN INTERVENTION'S ANALYSIS OF RIGHTS AND RELATIONSHIPS.

39. As previously stated, DTC and DTC Participants are Intermediaries functioning as agents of both the Issuer and the Beneficial Owner. Neither DTC nor DTC

Participants have claimed any legal ownership interest to the Excess Receipts at issue herein. The brokerage firms cannot reasonably or legally be characterized as either creditors or debtors. Moreover, it makes no sense to analyze rights on the basis of who is the "Record Owner" of the securities or of the Distributions, since the identity of the "Record Owner" varies depending on whose records are being examined.

40. The declaration of a dividend or principal and interest payments basically represents a debt between the Issuer and the Beneficial Owner. The Beneficial Owner is in fact the creditor and the Issuer the debtor. It makes no difference for purposes of legal analysis in this case that the Beneficial Owner may have been paid the Distribution, because all of these Excess Receipts are simple accounting

errors occurring on at least three (3) different sets of books and records. All Excess Receipts arise in the context of the chain of transactions between the debtor-Issuer and creditor-Beneficial Owner, and if the existence and location of the Beneficial Owner is unknown, the Excess Receipts, pursuant to Texas v. New Jersey, 379 U.S. 674, should be remitted to the state of incorporation of the Issuer.

X. SPECIFIC PROPERTY CLAIMED BY PLAINTIFF IN INTERVENTION.

41. In its complaint, Delaware identifies fifteen DTC Participants incorporated in Delaware from which New York has either wrongfully taken or demanded the Excess Receipts at issue herein. One such brokerage firm identified is Dean Witter Reynolds, Inc. According to the actual Report of Abandoned Property filed by Dean Witter Reynolds, Inc. ("Dean

Witter Report") with the New York Comptroller, Dean Witter Reynolds, Inc. turned over $354,737.02 to New York in 1982, along with 319 individual stock certificates, which amount represented abandoned property held by said firm at the close of business December 31, 1981. Of that amount, at least $1,478 represented moneys that were attributable to Issuers incorporated in the State of Texas. Texas in its Complaint in Intervention claimed the right to take possession of such moneys. In addition Texas claimed the right to any other Excess Receipts generated by Texas Issuers held or formerly held by the brokerage firms incorporated in the State of Delaware and remitted to or demanded by New York for the period 1978 through 1985. Wisconsin now makes identical claims for moneys attributable to

Issuers incorporated in the State of Wisconsin.

42. While the amount turned over by Dean Witter Reynolds, Inc. and claimed by Texas may seem small, it represents but one year of these Excess Receipts reported by a single brokerage firm. The amount of unclaimed property presently in issue in this litigation that Texas and Wisconsin are entitled to claim is presently unknown, but is very substantial.

XI. ADDITIONAL EXCESS RECEIPTS.

43. In addition to claiming a portion of the Excess Receipts held or formerly held by the brokerage firms and demanded by or remitted to New York, Plaintiff in Intervention asserts a claim to certain Additional Excess Receipts demanded by or remitted to the State of New York which is not at issue between Delaware and New York,

but which should be considered by the Court. As will be described more fully in Parts XII and XIII, infra, the property consists of those Additional Excess Receipts held by DTC or its Nominee, Cede & Co. It also consists of Additional Excess Receipts which have arisen in connection with Distributions made by Governmental Issuers, which property is only now being demanded by New York pursuant to a recent statutory amendment.

44. The amount of such Additional Excess Receipts greatly exceeds the amount of Excess Receipts presently in controversy. If this proceeding remains limited in scope to the Excess Receipts already in issue, it will be the proverbial case of the "tail wagging the dog."

XII. ADDITIONAL EXCESS RECEIPTS HELD BY DTC.

45. DTC[4] holds huge amounts of Additional Excess Receipts. These Additional Excess Receipts come into existence and acquire their character as unclaimed property in the same basic manner as the Excess Receipts held by DTC Participants.

46. DTC describes these Additional Excess Receipts as "Cede Float," which includes "payments on securities no longer on deposit" with DTC. The "Cede Float" occurs "after DTC transfers a securities certificate by endorsement, the transfer from DTC's nominee Cede & Co. is not reregistered on the books of the Issuer until a later time. Prior to

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[4]Wisconsin is informed that a copy of the 1987 Annual Report of the Depository Trust Corporation has previously been filed with the Court.

reregistration, DTC may receive payments to Cede & Co. from the Issuer." Texas Complaint in Intervention, Exhibit "3" at 1.

47. Any balance remaining in connection with a Distribution after all DTC Participants' have been paid is "assumed to be applicable to the float and is recorded in the 'Unclaimed Dividends Account.'" Again, by DTC's own admission, the Additional Excess Receipts in the "Unclaimed Dividends Account" do not belong to DTC, but are merely held by DTC for the accounts of DTC Participants for the accounts of their Customers, the Beneficial Owners. Additional Excess Receipts remaining in the "Unclaimed Dividends Account" after three years are considered abandoned and are remitted by DTC to New York. Texas Complaint in Intervention, Exhibit "3" at 2.

48. Plaintiff in Intervention claims the Additional Excess Receipts and all Additional Excess Receipts held by DTC for the period 1978 through 1985 attributable to Issuers incorporated in the State of Wisconsin. This claim is made for the same reason and on the same basis that Wisconsin claims a portion of the funds already at issue in this litigation.

50. When Book Entry Certificates are issued, DTC is in direct contractual relationship with the Issuer and functions as the Issuer's Paying Agent and registrar. Thus, without regard to other claims, DTC is responsible as a Paying Agent under Texas v. New Jersey, 379 U.S. 674. Paying Agents presently remit owner unknown Distributions to the state of incorporation.

XIII. ADDITIONAL EXCESS RECEIPTS ATTRIBUTABLE TO GOVERNMENT ISSUES.

51. The second type of Additional Excess Receipts results from bonds or debentures issued by Governmental or corporate Issuers. When the Issuer is a governmental entity, Distributions always arise in connection with municipal bonds issued to finance local governmental projects, and consist of principal and interest payments. They have never been reported or remitted to any state. They are now being demanded by New York. Pursuant to amendments to Section 300 of New York's Abandoned Property Law,[5] which became effective April 21, 1987, Distributions attributable to Governmental Issuers held on or after July 1, 1984, are now being demanded by New York if they have

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[5]New York Abandoned Property Law § 300 (McKinney Supp. 1988).

not been claimed at the expiration of three years.

52. DTC and DTC participants have never reported or remitted to any state these Additional Excess Receipts; instead, they have been lying fallow at DTC and at each and every DTC Participant. Until now, there has been no vehicle by which any state could claim and take possession of these Additional Excess Receipts paid into the Distribution System by each of the states' cities, counties and school districts.

53. Plaintiff in Intervention claims the right to take possession of Additional Excess Receipts held by DTC and all DTC Participants attributable to Wisconsin Governmental Issuers for the period 1978 to 1985, the same period covered by this suit. With respect to the Additional Excess Receipts held by the DTC Participants,

Plaintiff in Intervention claims that property for the same reason and on the same basis that it claims a portion of the funds already at issue in this litigation.

54. While the amount of its claim to Additional Excess Receipts held by DTC and any DTC Participants attributable to Wisconsin Governmental Issuers is presently unknown, Plaintiff in Intervention estimates that amount will be substantial.

XIV. PROPRIETY OF CONSIDERING ADDITIONAL EXCESS RECEIPTS.

55. Plaintiff in Intervention urges the Court to consider and determine the rights to claim the potentially huge amounts of Additional Excess Receipts. The decision of this Court with respect to the Excess Receipts already before it will conclusively and finally determine the rights of all states to take custodial possession of such Additional Excess

Receipts. Such a final determination of rights should not be made without the Court's having first considered arguments which are relevant and peculiar to the Additional Excess Receipts. Inclusion of the Additional Excess Receipts will not broaden the issues or unduly complicate the pending litigation.

56. The Additional Excess Receipts were not initially made part of this litigation because neither Delaware nor New York had any incentive to include them. DTC is incorporated in the State of New York. All Additional Excess Receipts held by DTC would therefore be remitted to New York and all Excess Receipts held by DTC Participants would go to Delaware, under the theory urged in this litigation by Delaware. Under New York's theory of this litigation, New York would take all Additional Excess Receipts and Excess

Receipts from both DTC and DTC Participants. By amending its statute, New York has also poised itself to seize all Additional Excess Receipts existing in the form of municipal bond Distributions.

XV. MERITS OF CLAIM ASSERTED AND RESOLUTION URGED BY PLAINTIFF IN INTERVENTION.

57. In Texas v. New Jersey, 379 U.S. 674, and Pennsylvania v. New York, 407 U.S. 206, the Court made clear its commitment to resolving unclaimed property controversies in a manner that is both easy to administer and equitable. The resolution urged by Plaintiff in Intervention satisfies both criteria. It is easy to administer, since the identity of the Issuer is always easily determined. Indeed, the identity of the Issuer is consistently known and reflected on all sets of books and records of all parties to the securities transactions.

Moreover, all DTC Participants have regional or branch offices located in every state. These branch offices already maintain a separate set of books and records for local Customers evidencing their local Customers' ownership interests and Distribution receipts. Each branch/regional office also maintains its own bank account, and is individually accountable for year-end profit and loss statements to its New York headquarters. Presently, each branch office also maintains its own "Suspense Accounts" for unclaimed Distributions. These unclaimed funds are returned to their New York headquarters and are then remitted by the DTC Participant to New York. Thus transaction records already exist on a state-by-state basis.

58. The resolution proposed by Plaintiff in Intervention is also by far

the most equitable method of distributing the unclaimed property at issue in this lawsuit. This is particularly true with respect to the Additional Excess Receipts consisting of municipal bond Distributions. It is outrageous that moneys held by DTC Participants attributable to the State of Wisconsin and its political subdivisions might be remitted to New York, or any state, other than the State of Wisconsin. It is also particularly egregious that the Additional Excess Receipts held by DTC, which clearly functions merely as a Paying Agent or registrar in these transactions, are being demanded by and will be, without this Court's intervention, remitted to New York.

59. Excess Receipts can legitimately be characterized as nothing more than "distribution slop," created by poor accounting practices and record keeping

error and attributable in part to the inadequate training given to people responsible for the accounting and the maintenance of books and records. Excess Receipts truly constitute unclaimed property for which no Beneficial Owner or other person with any legal entitlement thereto is ever likely to appear. To determine the rights of various states to claim such Excess Receipts on the basis of the arguments urged by either Delaware or New York will, in essence, elevate form over substance. The respective resolutions sought by both Plaintiff and Defendant are not compelled by, or consistent with, a strict interpretation of legal precedent. Most importantly, however, both such resolutions are simply unfair.

WHEREFORE, Plaintiff in Intervention prays:

1. That Plaintiff in Intervention be allowed to intervene herein;

2. That Additional Excess Receipts held by the Depository Trust Company and demanded by or remitted to New York for the period 1978 through 1985 be included as part of the unclaimed property in controversy in this lawsuit;

3. That Additional Excess Receipts attributable to Governmental Issuers held by the Depository Trust Company and all DTC Participants for the period 1978 through 1985 be included as part of the unclaimed property in controversy in this lawsuit;

4. That the temporary injunction sought by Delaware with respect to the Excess Receipts already at issue herein be extended, for the reasons stated in the Complaint of Delaware, to restrain New York

from demanding or taking possession of all Excess Receipts attributable to Issuers incorporated in the State of Wisconsin or to Wisconsin Governmental Issuers;

5. That Defendant New York be restrained and enjoined from collecting any Excess Receipts and Additional Excess Receipts attributable to Issuers incorporated in the State of Wisconsin or attributable to Wisconsin Governmental Issuers, and from expending any sums collected but presently unspent, consisting of such Excess Receipts and Additional Excess Receipts, until such time as this controversy is resolved;

6. That judgment be entered that the Excess Receipts and Additional Excess Receipts held by DTC and DTC Participants attributable to Issuers incorporated in the State of Wisconsin or to Wisconsin Governmental Issuers is subject only to the

claims of the State of Wisconsin under ch. 177, Wis. Stats.; and

7. That New York be directed to pay or deliver to Plaintiff in Intervention all of the Excess Receipts and Additional Excess Receipts paid or delivered to New York attributable to Issuers incorporated in the State of Wisconsin and Wisconsin Governmental Issuers which have been abandoned for the applicable dormancy period under ch. 177, Wis. Stats.;

8. That Plaintiff in Intervention be granted such other and further relief as this Court deems just.

Respectfully submitted,

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May, 1989

PROOF OF SERVICE

I, Daniel D. Stier, certify that I am counsel of record for Plaintiff in Intervention, the State of Wisconsin, that I am a member of the Bar of the Supreme Court of the United States, and that on the 5th day of May, 1989, I served three copies of Wisconsin's Motion for Leave to Intervene and Complaint in Intervention on all parties required to be served by depositing such copies, first class postage prepaid, in the United States mail, addressed as follows:

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